

UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT

CALL CENTER TECHNOLOGIES,	:	
INC.,	:	
	:	
Plaintiff,	:	
	:	
v.	:	No. 3:03CV01036(DJS)
	:	
GRAND ADVENTURES TOUR & TRAVEL	:	
PUBLISHING CORPORATION, INC.	:	
and INTERLINE TRAVEL & TOUR,	:	
INC.,	:	
	:	
Defendants.	:	

**MEMORANDUM OF DECISION AND ORDER**

The plaintiff, Call Center Technologies, Inc. ("Call Center"), brought this action against the defendants, Grand Adventures Tour & Travel Publishing Corporation, Inc. ("GATT") and Interline Travel & Tour, Inc. ("Interline") alleging breach of contract and successor liability pursuant to Connecticut law.<sup>1</sup> Call Center maintained that GATT, which is essentially a defunct company, had breached a contract with Call Center, and that Interline was liable for this alleged breach because Interline is a successor company to GATT. Thereafter, Call Center moved for

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<sup>1</sup>This case was originally filed against GATT in the Connecticut Superior Court, Judicial District of Danbury ("the State Court Proceeding"). In the State Court Proceeding, a default against GATT entered because GATT had failed to appear or plead. Subsequently, Call Center was permitted to add Interline as a defendant to the State Court Proceeding, and Call Center amended its complaint accordingly. Interline entered its appearance in the State Court Proceeding and thereafter removed the case to this Court pursuant to 28 U.S.C. § 1332, representing that the Court had subject matter jurisdiction because the matter in controversy exceeded \$75,000 and was between entities that are citizens of different States.

the entry of a default judgment against GATT in the amount of \$560,576.22, and Interline moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. On February 18, 2009, the Court granted Call Center's motion for the entry of a default judgment against GATT<sup>2</sup> and granted Interline's motion for summary judgment. See Call Center Technologies, Inc. v. Grand Adventures Tour & Travel Publishing Corp., Inc., 599 F. Supp. 2d 286 (D. Conn. 2009).

On March 12, 2009, Call Center moved pursuant to Rule 60(b)(4) of the Federal Rules of Civil Procedure to: (1) vacate the Court's February 18, 2009 decision and judgment; and (2) to remand this action to the Connecticut Superior Court. (See dk. #s 209 & 210.) Because, however, Call Center had not filed its Rule 60 motion within ten days after entry of the judgment, the time to file an appeal continued to run and did not toll. See Fed. R. App. P. 4(a)(4)(A)(vi). Thus, Call Center also filed a notice of appeal. (Dkt. # 212.) Interline, in response, filed an opposition to Call Center's motion to vacate and remand (dk. # 214), and moved, both with this Court (see dk. # 215) and with the Second Circuit, to sever and dismiss GATT from this case.

The post-judgment proceedings in this case have been a bit unusual. At the outset, the Court notes that, in the normal course of things, once a notice of appeal is filed, jurisdiction

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<sup>2</sup>GATT failed to appear or otherwise plead in this case.

is conferred upon the court of appeals, and the district court is divested of control over those aspects of the case involved in the appeal. See Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58 (1982); Motorola Credit Corp. v. Uzan, 388 F.3d 39, 53 (2d Cir. 2004). Indeed, the Second Circuit has noted that

[w]hile the federal rules do permit the district court to relieve a party or a party's legal representative from a final judgment, see Fed. R. Civ. P. 60(b), this circuit has repeatedly held that the docketing of a notice of appeal ousts the district court of jurisdiction except insofar as it is reserved to it explicitly by statute or rule.

Toliver v. County of Sullivan, 957 F.2d 47, 49 (2d Cir. 1992) (internal quotation marks omitted). This principle was, in essence, Interline's main argument in opposition to Call Center's motion to vacate and remand. Interline maintains that this Court cannot entertain Call Center's motion because of Call Center's appeal.

The Second Circuit has also noted, however, that even after a notice of appeal is filed, "the district court can entertain and deny [a] rule 60(b) motion[.]" Id. In addition, "the district court may *grant* a rule 60(b) motion after an appeal is taken only if the moving party obtains permission from the circuit court." Id. "In other words, before the district court may grant a rule 60(b) motion, [the Second Circuit] must first give its consent so it can remand the case, thereby returning jurisdiction over the case to the district court." Id. In the

Court's understanding of this language, it can review Call Center's motion to vacate and remand. If the Court were inclined to simply deny Call Center's motion, it could do so without the Second Circuit's consent. If, on the other hand, the Court were inclined to grant Call Center's motion, it could not do so without the Second Circuit's consent, i.e., without the Second Circuit remanding the case to this Court to rule on the motion. If, after giving tentative consideration to a Rule 60(b) motion filed during pendency of an appeal, the Court believes that the motion is meritorious, it should notify the moving party, who then may seek remand of the case by the Second Circuit for the limited purpose of a ruling on the motion.

The Court notes that this is an odd procedure because it asks the Court to tentatively decide a motion in a situation where the Court does not necessarily have jurisdiction to rule on it. That being said, Call Center's arguments appear to have merit. There were no federal questions at issue in this case. Instead, this case was removed to federal court because the matter in controversy exceeded \$75,000 and Call Center, GATT, and Interline (apparently) were citizens of different states. In fact, the Court's summary judgment decision indicated as such, noting Call Center is a Delaware corporation, GATT was an Oregon corporation, and Interline is a Texas corporation. See Call Center Technologies, Inc., 599 F. Supp. 2d at 290.

Now, Call Center has presented evidence that GATT was not an Oregon corporation, but in fact a Delaware corporation.<sup>3</sup> If this is true, then there was no complete diversity of the parties when this case was removed from the Connecticut Superior Court, which in turn means that this Court lacked (and any federal appellate court lacks) subject matter jurisdiction here. The issue of subject matter jurisdiction can be raised at any time, even after the entry of a judgment. If the Court never had subject matter jurisdiction, the judgment entered was never valid and must be vacated, and this case must be sent back to the Connecticut Superior Court.

At this juncture, however, the Court cannot indicate whether it would be inclined to granting Call Center's motion to vacate and remand because, although Interline did file an opposition to Call Center's motion, Interline focused its discussion on whether the Court had jurisdiction to entertain the motion. That is, Interline did not actually address the substance of Call Center's motion, i.e., whether GATT was, in fact, a Delaware corporation. Given this fact, the Court is reluctant to indicate whether it is inclined to grant Call Center's motion. Before any tentative decision is made, or before any indication is given, the Court shall provide Interline the opportunity to address this issue.

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<sup>3</sup>According to Call Center, GATT had been formed as an Oregon corporation, but subsequently merged with a target Delaware corporation. Call Center further maintains (and submits evidence in support thereof) that the entity surviving the merger was to be a Delaware corporation.

**Therefore, on or before June 19, 2009, Interline shall file a memorandum providing its position on GATT's incorporation status.**

Finally, there is Interline's motion to sever. The Court feels little need for discussion here. As stated in a letter from Interline, the motion to sever was filed with both this Court and the Second Circuit. The Second Circuit then contacted this Court and informed the Court that, given Call Center's appeal, it (the Second Circuit) would rule on Interline's motion. The Second Circuit has done so, denying the motion to sever. (See dk. # 220.) The Court thus finds that Interline's motion pending before this Court is rendered moot by the Second Circuit's order. Consequently, Interline's motion to sever (**dk.** # 215) is **DENIED as moot.**

#### **CONCLUSION**

For the foregoing reasons: (1) Interline shall file a memorandum providing its position on GATT's incorporation status on or before June 19, 2009; and (2) Interline's motion to sever

(dkt. # 215) is DENIED as moot.

SO ORDERED this 5th day of June, 2009.

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/s/DJS

DOMINIC J. SQUATRITO  
UNITED STATES DISTRICT JUDGE